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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 596

SEARS, ROEBUCK & Co. and PARKER MANUFACTURING COMPANY, *Petitioners,*

v.

HAROLD T. JONES and THE PETERSEN MANUFACTURING COMPANY, INC., *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	Page
Opinions Below	1
No Question Presented	2
Statement of the Case	4
Reasons for Denying Writ of Certiorari	4
I. Petition Manifests Its Own Weakness—Large Number of Alleged Errors and Cited Decisions Demonstrates Lack of Any Issue Justifying Review on Certiorari	4
II. The Issues Presented in the Instant Case Are Usual Factual Issues Concerning the Validity and Infringement of a Patent—Issues Decided with Consistency by Both the District Court and the Court of Appeals	5
III. There Are No Unusual Questions of Widespread Interest	7
(A) The Patent Concerns a Specific and Particular Type of Wrench, and Is NOT of "Unusual" Public Importance	7
(B) There Is No Question of Expansion of the Patent Monopoly — Petitioners Purloin Words of Art in Attempt to Catch Eye of Court	7
(C) Nothing Was Sacrificed So There Is Nothing that Could Have Been Recaptured	9
(D) There Can Be No Expansion of a Petersen Monopoly—The Only Monopoly Involved Is that Given Jones by His Patent	9

Page

IV. There Is No Inconsistency Between the Decisions Below and Established Principles of Patent Law, Decisions of This Court, or Decisions of Other Courts—Miscellaneous Arguments Fail .. 10

(A) There Is No Question of "Pioneer Invention"—Both Lower Courts Considered Minimal Equivalency 10

(B) The Inability of Respondents' Attorney to Properly Advise His Clients Results from His Own Conduct Rather than Misapplication of the Law by the Courts Below 11

(C) The Decision Below Is Clearly Consistent with Many Cases of This Court Involving the Same Type of Fact Situation 12

(D) The Decisions Below Are Clearly Consistent with Decisions of Other Circuits Involving Substantially Identical Fact Situations ... 12

Conclusion 13

Appendix A—Statement of the Case 1a

(A) Contribution to Art—Prior Unsatisfactory "Release" 1a

(B) Inventor Makes Two Models—One With Reversed Parts of Other, Attorney Advises Both Models Covered By Application as Filed 1a

(C) Usual Prosecution of Patent Application—Claims Sought From Filing Date Approved in Appeal Proceeding Following Priority Contest 2a

(D) Claim Covering Both Models Allowed By Patent Office—Licenses Sought and Taken by Two Manufacturers From Date of Allowance of Patent 4a

(E) Respondent Petersen Saves Inventor From Defaulting Licensees 5a

Page

(F) Petitioner Sears Buys Respondents' Wrench For Purpose Of Making And Selling A Competitive Structure—Petitioner Parker Makes Model Of Jones Wrench With Parts Merely Reversed From Model Sold By Respondent Petersen. Court Finds Petitioners' Model Within Patent Claims Expressly and Implicitly 5a

(G) Respondents' Attorney Gives Erroneous Opinion As To Infringement—Claim of Patent Admittedly Reads Literally On Accused Structure Within Most Limited Express Meaning of Words Thereof 7a

Table of Cases Cited

Binks Mfg. Co. v. Ransberg Electro-Coating Corp., 281 F. (2d) 252 (C.A. 7, 1960) 12
Continental Paper Bag Co. v. Eastern Paper Bag Co. 210 U.S., 405 11
Engineering Development Laboratories v. Radio Corporation of America, 153 F. (2d) 523 (C.A. 2, 1946) . 12
Goodyear Tire & Rubber Co., Inc. v. Ray-O-Vac Co., 321 U.S., 275 7
Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605 ..... 8, 12
Hildreth v. Mastoras, 257 U.S., 27 12
Imhaeuser v. Buerk, 101 U.S., 647 11
Ives v. Hamilton, Executor, 92 U.S. 426 11
Machine Co. v. Murphy, 97 U.S., 120 11
Sanitary Refrigerator Co. v. Winters, 280 U.S., 30 . 10, 11
Smith v. Snow, 294 U.S., 1 12
Williams Manufacturing Co. v. United Shoe Machinery Corp., 316 U.S., 364 6
Winans v. Denmead, 56 U.S., 329 12

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OPINIONS BELOW

The opinions of the Courts below holding the patent in suit valid and infringed are reported as follows:

District Court—187 F. Supp. 293; 127 USPQ 411;
Court of Appeals—308 F(2d) 705; 135 USPQ 149.

NO QUESTION PRESENTED

There is no question presented since the following facts were clearly established by the evidence:

(a) That the invention of the patent represents "an important contribution to the art;"

(b) That the prior art fails to disclose anything previous to the inventor's application filing date teaching the inventor's method of operation and type of structure;

(c) That the accused infringing structure incorporates a mere reversal of parts from the structure shown as the illustrative preferred embodiment of the patent in suit, which reversal is obvious to even a layman;

(d) That the inventor of the patent in suit was, before the filing date of the application for the patent in suit, the first to make both the structure shown as the illustrative preferred embodiment in the patent in suit and the alternative structure with reversed parts;

(e) That the inventor of the patent in suit, and his attorneys, from the outset, were constantly seeking claims unequivocally reading on the structure of the invention with or without the parts reversed, but as to such claims repeatedly met with Patent Office Examiner's objections as to the phraseology until after Interference and Appeal Proceedings were terminated, whereupon the patent was issued with all the claims in suit;

(f) That the accused structure admittedly falls literally within the express terms of one claim of the patent in suit and implicitly within other claims;

(g) That the patent was only issued after an Interference Proceeding and after an Appeal Proceeding in the Patent Office.

(h) That the patentee never argued or represented to the Patent Office that his invention was limited to the specific structural arrangement shown in the patent drawing as the illustrative embodiment of the invention, but instead continuously argued for, and ultimately obtained an allowable claim unequivocally reading on the invention with or without the parts reversed, thus precluding any estoppel.

(i) Even though Petitioners had four different models of releasing plier-type toggle wrenches available at the time of their initial production, they intentionally produced and sold the accused infringing wrench (1) after studying Respondents' commercial wrench; (2) with knowledge that the accused infringing wrench was the closest model to Respondents' commercial wrench made in accordance with the preferred embodiment of the patent in suit; and (3) after reviewing their own attorney's opinion indicating that the other three models available did not even present a question of infringement of the patent in suit.

STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is inaccurate and incomplete in many respects. Respondents, for completeness and in answer to Petitioners' misstatements of facts, present in Appendix A hereto and accurate Statement of the Case. Incorporation of a Statement of the Case in the body of this Brief appears unnecessary in view of the following reasons, which clearly demonstrate the lack of any basis which would justify this Court's review of the instant case.

REASONS FOR DENYING WRIT OF CERTIORARI

I. PETITION MANIFESTS ITS OWN WEAKNESS—LARGE NUMBER OF ALLEGED ERRORS AND CITED DECISIONS DEMONSTRATE LACK OF ANY ISSUE JUSTIFYING REVIEW ON CERTIORARI

The Petition speaks in terms of generalities, lists eight supposedly novel questions presented, alleges at least ten errors supposedly made in the consistent Decisions of both Courts below, and cites over thirty prior cases supposedly in conflict with such decisions.

If Petitioners were in possession of even one valid error or true instance of inconsistency, then their Petition would have been specific, and would not have alleged a multiplicity of different errors reading like the index of a patent law text book, and phrased in terms of inapposite "words of art" calculated to catch the eye of the reader.

As this court apparently recognizes by its acceptance of patent cases only in the rarest instances, the patent laws are notoriously well defined, having remained basically the same for over a century. Accordingly, it is unreasonable to believe that there are actually eight novel questions of law presented by the instant case.

There are, in fact, **no novel questions of law presented**, and the Petitioners' listing of a multiplicity of questions alone indicates the weakness of the Petition.

Furthermore, the Court of Appeals for the Tenth Circuit has often been called upon in recent years to review patent cases, and Chief Judge Murrah, the Judge delivering the opinion below in the present case, has personally delivered a substantial number of the recent patent opinions from his Court. It is thus apparent that the present case has been viewed by experienced eyes—eyes which cannot reasonably be presumed to have committed ten errors of law which result in a decision conflicting with over thirty prior cases,* as Petitioners assert.

Viewed in proper perspective, the Petition is but a request for a trial *de novo*—it demonstrates that there is no justification for review of the present case.

II. THE ISSUES PRESENTED IN THE INSTANT CASE ARE USUAL FACTUAL ISSUES CONCERNING THE VALIDITY AND INFRINGEMENT OF A PATENT—ISSUES DECIDED WITH CONSISTENCY BY BOTH THE DISTRICT COURT AND THE COURT OF APPEALS

The basic questions presented in this case are the usual factual-type questions which arise in patent litigation. When such issues are extracted in intelligible form from the Petitioners' Brief, they can be accurately summarized as follows: (a) Was the patentee the first in the art to disclose a release lever of any kind between the handles of a plier-type toggle wrench which cooperated with the movable handle and toggle link to pry open the jaws of the wrench? (b) Was

* Substantially all of such cases were cited and/or quoted in the Courts below by Petitioners.

there any problem which was solved by the invention and which evaded prior solution? (c) Does the accused structure produce the same result, in the same way, by at least substantially the same mechanical means as the structure shown as the illustrative preferred embodiment of the patent in suit even within a minimal range of mechanical equivalents? (d) Is there anything indefinite about the disclosure of the patent which sets forth as the preferred embodiment, by word and picture, the same operative parts and inventive method which was reversed, with inconsequential variations in structure, by the infringers? (e) Is the wording of Claim 5 of the patent, which admittedly reads directly on the accused structure, anything more than a rephrasing of claims continuously sought in the application from the filing date thereof, or an explicit statement of what was implicit in the original disclosure of the application for the patent in the suit? (f) Did the patentee limit his claims to a specific structural detail in view of the disclosures of prior art, argue or represent that such detail defined in his claim constituted the distinguishing feature of his claims over prior art, and then issue his patent only with claims limited to such structural detail?

Each of the above **ordinary patent litigation questions** are clearly factual. They have each been resolved, after careful consideration, in favor of the Respondents, by both the United States District Court for the District of Colorado and by the United States Court of Appeals for the Tenth Circuit. Under these circumstances, this Writ should be denied in accordance with at least the following cases: *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U.S. 405, 416; *Williams Manufacturing Co.* v. *United Shoe*

Machinery Corp., 316 U.S. 364, 367; *Goodyear Tire & Rubber Company, Inc.* v. *Ray-O-Vac Company*, 321 U.S. 275, 278.

III. THERE ARE NO UNUSUAL QUESTIONS OF WIDESPREAD INTEREST

(A) The Patent Concerns a Specific and Particular Type of Wrench, and Is NOT of "Unusual" Public Importance

The patent in suit concerns a specific type of release for a plier-locking wrench—one of many types of locking wrenches—locking wrenches being one species within the broad class of wrenches in general—wrenches in general being one category of hand-gripping tools—hand-gripping tools being one classification under the broad heading of hand tools—and hand tools being a category of tools generally. Thus, it is obvious that the subject matter of the patent only has application to a minor fractional part of one very narrow branch of a specific industry. Accordingly, no stretch of semantics can make the patent of sufficient public importance to justify review of the decisions below by this Court.

(B) There Is No Question of Expansion of the Patent Monopoly—Petitioners Purloin Words of Art in Attempt to Catch Eye of Court

Petitioners, after listing no less than eight lengthy and somewhat repetitive "Questions Presented" finally conclude with a short, so-called "basic question" which exceeds even the most imaginative concepts that may be remotely applicable to the present case. Their extraction and use of certain words of art within the so-called "basic question", namely, "undue expansion of the patent monopoly" represents an attempt to attach some significant legal aspect to the present case, which

is not only contrary to fact, but is also manifestly contrary to Petitioners' own admissions.

Petitioners admit that one claim of the patent in suit at least, namely, Claim 5, reads directly and unequivocally on the accused infringing wrench. Accordingly, infringement was found within the express words of the patent claims without any expansion whatsoever. The doctrine of equivalents was used only to show that there was clear infringement of even the most specifically worded claims of the patent in suit, if such claims were given the narrowest interpretation. Infringement of the more specifically worded claims was within the express terms of Claim 5, and thus there obviously was no expansion of the patent under the doctrine of equivalents. Moreover, since one claim of the patent expressly covers the accused infringing structure, the present case is within the narrowest bounds of *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U.S. 605, even consistent with the dissenting opinions thereof. Still further, there is no issue of "patent misuse" in the present case, and thus the circumstances in which the phrase "undue expansion of the patent monopoly" finds its customary application, are not existent here.

Through use of the word "expansion", the Petitioners attempt to generate interest in an ordinary patent infringement action which, in fact, as indicated above, is free of any "expansion" issue (as well as any other unique or generally important issue).

(C) Nothing Was Sacrificed So There Is Nothing That Could Have Been Recaptured

As the Courts below verified, the accused infringing structure was an infringement of at least one of the earliest presented and earliest allowed Claims (Claim 1) in the Jones' application. It is thus clear that no protection was sacrificed, so there was nothing which could have been recaptured as Petitioners assert. While Claims worded similar to Claim 5 of the patent met with early rejections on indefiniteness, Claim 5 was ultimately allowed. As allowed, the Claim represented but a rephrasing of prior claims and an express statement of protection which was otherwise implicit.

(D) There Can Be No Expansion of a Petersen Monopoly—the Only Monopoly Involved Is That Given Jones By His Patent

The Jones' patent, consistent with the Constitution and Patent Laws formulated thereunder, gave Respondent Jones the privilege to exclude others from use of his invention—a privilege which Jones could use or license as Jones saw fit. Jones licensed **his** privilege to Respondent Petersen in return for a royalty when Jones' prior licensees were in default. Respondent Petersen did no more than compensate the inventor Jones (a separate and distinct individual from Petersen in every way) in return for certain rights under the patent laws which were given Jones to use or license, as Jones desired.

IV. THERE IS NO INCONSISTENCY BETWEEN THE DECISIONS BELOW AND ESTABLISHED PRINCIPLES OF PATENT LAW, DECISIONS OF THIS COURT, OR DECISIONS OF OTHER COURTS—MISCELLANEOUS ARGUMENTS FAIL

(A) There Is No Question of "Pioneer Invention"—Both Lower Courts Considered Minimal Equivalency

The Doctrine of Equivalents was used by the Courts below to show clear infringement of even the most specifically worded claims of the patent suit, which infringement was within the express terms of at least one other claim of the patent in suit. Notwithstanding this fact the Trial Court, looking further than necessary, believed that the facts established that the invention shown in the patent was a pioneer invention. However, the Trial Court recognized that this was a close determination, and based its consideration of the limited issue involving equivalents expressly on the assumption that the invention was not of pioneer character. The Court of Appeals similarly based its decision on the limited issue on a very conservative approach stating:

> "Relatedly, we reject appellants' argument that the trial court erred in extending to the patent in suit too wide a range of equivalency. The obvious reversal of parts employed by the accused device is necessarily included within the minimal equivalency to which even a patent granted on a small advance over a prior crowded art is entitled."

It is thus apparent that the Petitioners' arguments with respect to "pioneer invention" as applied herein represent use of a particular phrase taken completely out of context. The test of equivalency applied in the courts below is clearly consistent with the well established and well defined case law. *Sanitary Refrig-*

erator Company v. *Winters et al*, 280 U.S. 30, 40-43; *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, *supra*, 414-422; *Imhaeuser* v. *Buerk*, 101 U.S. 647, 662-664; *Machine Company* v. *Murphy*, 97 U.S. 120, 125; *Ives* v. *Hamilton, Executor*, 92 U.S. 426, 430-431. Moreover, as explained above, equivalency was not used to expand the patent.

(B) The Inability of Petitioners' Attorney to Properly Advise His Clients Results From His Own Conduct Rather Than Misapplication of the Law by the Courts Below

The opinion given by Petitioners' attorney prior to the present litigation, is used as a basis for arguing that the Decisions below are contrary to established law. Such opinion states that Claim 5 of the patent does not read on the accused infringing structure; at the same time, Petitioners **now admit** that Claim 5 does expressly and unequivocally read on the same accused infringing structure. In brief, the opinion given on one day's consideration and without reviewing the file of the patent in suit, contains an obvious and admitted error.* Under these circumstances, the argument that counsel could not properly advise his clients in view of the Decisions below, must obviously fail. Even before the Decisions below, counsel for Petitioners did not properly advise his clients.

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* The points of law which Petitioners argued below and repetitiously argue here, concern matters about which Petitioners' attorney was completely ignorant at the time the opinion in question was given and therefore could not have affected his opinion. Each point relates to facts developed after the litigation was instituted and after Petitioners' attorney realized that his initial opinion was clearly in error.

(C) The Decisions Below Are Clearly Consistent With Many Cases of This Court Involving the Same Type of Fact Situation

The Decisions of this Court in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605; *Hildreth v. Mastoras*, 257 U.S. 27; *Sanitary Refrigerator Co.* v. *Winters, supra; Smith* v. *Snow*, 294 U.S. 1, and, *Winans* v. *Denmead*, 56 U.S. 329, alone serve to demonstrate the consistency between the established law and the decision reached in the present case. These prior decisions involve fact situations which were substantially less favorable to the patentee than the instant decision. The instant case thus falls within the most limited interpretation of these prior cases. Other decisions of this Court, too numerous to mention in detail, further demonstrate the fact that this case is just another patent case to which the usual legal principles have been properly applied.

(D) The Decisions Below Are Clearly Consistent With Decisions of Other Circuits Involving Substantially Identical Fact Situations

The Second Circuit Court of Appeals and the Seventh Circuit Court of Appeals have been presented with fact situations which are essentially identical with that presented in the instant case. Both Circuits have resolved the cases consistent with the Decisions in the present case. See, Judge Learned Hand's decision in *Engineering Development Laboratories* v. *Radio Corporation of America*, 153 F. (2d) 523, (CA 2, 1946). Also see, *Binks Mfg. Co.* v. *Ransberg Electro-Coating Corp.*, 281 F. (2d) 252 (CA 7, 1960)

CONCLUSION

For the foregoing reasons, Respondents pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

STATEMENT OF THE CASE

The following statement of the case, consistent with the facts found in the District Court and affirmed by the Court of Appeals, is presented herein because Petitioners' "Statement of the Case" speculates in the bald reassertion of "Ivied-covered" arguments without regard to facts.

(A) Contribution to Art—Prior Unsatisfactory "Release"

The patent in suit relates to plier-type toggle wrenches. Such wrenches effect a tight vise-like grasp of an article and are commonly used by mechanics working in restricted spaces, such as under the hood of an automobile.[1] Without a release lever thereon, such as that invented by Respondent-patentee Jones, both hands are required to open the wrench, often resulting in "cracked knuckles."[2] The Jones release lever invention eliminated this problem. The Petitioner, Sears, Roebuck, prior to appropriating the Jones invention to its use, sold a wrench having a so-called "quick release" thereon. Such early structure was different from the structure now used in the accused infringing wrench, and Petitioner Sears admits that such early structure (now abandoned) was inoperative to effect a quick release.[3]

(B) Inventor Makes Two Models—One With Reversed Parts of Other. Attorney Advises Both Models Covered By Application as Filed

After Jones developed his first model of the wrench with the release lever, he took the same to his Patent Attorney

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[1] See Petersen Pat. 1489458, Def. Exh. F, R. pp. 500, 639.

[2] R. pp. 502-503, 524, 541, 567.

[3] R. p. 415, "Well, I knew that it didn't work properly and that it was hard to operate and that when we called it an easy action it was a misnomer because it wasn't . . . It operated horribly hard."

and a Patent Application was filed on the invention.[4] The details of this model were used as a basis for the illustrative embodiment of the invention presented in the drawing of the application. Shortly after the application was filed, Jones brought a second wrench to his attorney showing the release lever parts reversed from the illustrative embodiment. The second wrench had been constructed before the application was filed and operated in an identical manner to the original model.[5] Jones was then advised by his attorney that the claims of the originl Patent Application covered the basic invention, with or without the parts reversed, and that there was no need to file another application.[6]

(C) Usual Prosecution of Patent Application—Claims Sought From Filing Date Approved in Appeal Proceeding Following Priority Contest

The Jones application was prosecuted in the Patent Office in a conventional manner, and claims were cancelled, added, and amended in response to Patent Office Actions. The Patent Office rejected the Jones' claims on the basis that the claims were indefinite or functional and, of course, cited prior Patents, taking the position that the claims were not patentable over these cited references in view of the indefiniteness therein.[7] After approximately two years of prosecution, and when no claims had been allowed to Jones, the Patent Office drafted an allowable claim on its own

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[4] R. p. 315, Pltf's. Exh. 2, p. 8.

[5] R. pp. 314-315, R. p. 382, Pltf's. Exh. 14, photo R. p. 295 (showing model).

[6] R. p. 319, letter R. p. 382, paragraph 3. See also, R. p. 209 where petitioners' expert admits there was no legal compulsion to file another application.

[7] It is apparent from a brief review of the File Wrapper of the Patent in suit, Pltf's. Exh. 2, that each action by the Patent Office included a rejection on indefiniteness.

initiative and suggested that Jones place this claim (now claim 1 of the Patent) in his application for purposes of an Interference proceeding.[8] Jones copied the claim,[9] and an Interference was set up. One of the parties to the Interference moved to dissolve the Interference on the grounds that the claim drafted by the Patent Office was not patentable and presented a strong argument to this effect; the Motion, however, was dismissed.[10] Thereafter, since all of the other parties in the Interference with Jones had filing dates long subsequent to Jones' filing date, these other parties were forced to concede priority of invention to Jones, thereby terminating the Interference in Jones' favor.[11]

Following the termination of the Interference Proceeding, Jones continued his attempt to obtain allowable claims broader than the claim suggested by the Patent Office,[12] but was primarily rejected by the Patent Office Examiner on the ground of indefiniteness. On appeal of the rejection to the Patent Office Board of Appeals, the Board affirmed the rejection of certain claims in the application on indefiniteness, but eliminated all rejections theretofore made on the basis of prior art and anticipation.[13] Upon remand of the application to the Examiner for further prosecution consistent with the Board's decision, the rejection was singularly limited to indefiniteness. Accordingly, Jones' local attorney instructed his patent associate in Washington, D. C. to conduct an interview at the Patent

[8] Pltf's. Exh. 2, File Wrapper of Jones Patent, p. 30, Paper No. 10.

[9] Ibid., p. 31, Paper No. 11.

[10] Ibid., p. 35, p. 40, Paper No. 14, p. 3.

[11] Ibid., p. 38, Paper No. 14, p. 32, Paper No. 12

[12] Ibid., see amendments filed, 9/7/48 (pp. 38-41); filed 3/3/49 (pp. 44-58) and Appeal filed 3/21/49 (pp. 55-57).

[13] Ibid., pp. 90-91 (decision of Board of Appeals, Paper No. 34).

Office in order to obtain an allowable claim substantively consistent with prior claims presented, but not subject to prior rejections on indefiniteness. The instructions to the associate made it clear that the claim should expressly read on both models of Jones' invention, i.e., the model which Jones initially brought to his attorney and the model which Jones made initially having the "reversed parts".[14]

(D) Claim Covering Both Models Allowed By Patent Office—Licenses Sought and Taken By Two Manufacturers From Date of Allowance of Patent

As a result of the conference with the Examiner, a Claim 26 was entered in the application,[15] and when Jones learned of the allowance of this Claim (now Claim 5 of the Patent), with other previously allowed claims, he advised Seymour Smith & Company, a then existent manufacturer of the Jones invention, of the allowance, and Smith Company in return **urged** cooperation and its desire for a license.[16] Jones had also contacted the only other then existent manufacturer (Bashford of California) of a wrench of the type in question embodying the Jones quick release feature, and, after some negotiations, both then existent manufacturers took licenses.[17]

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[14] R. p. 295, Pltf's. Exh. 14. The attorney was trying from the outset to obtain a claim of this scope, and the attorney as well as Jones believed the broad claims afforded this protection. (See letter, R. p. 382, paragraph 3). This statement by the attorney was unnecessary in this letter—i.e., there was no reason or necessity for making it to the Washington associate.

[15] Pltf's. Exh. 2, p. 102, Paper No. 37. Also see Claim 24 submitted 3/3/49, p. 47, Pltf's. Exh 2.

[16] See letters of Smith Co., R. pp. 649, 651, 652, 657, 661 ("we wish to state that we are interested and anxious to cooperate in this matter."), pp. 667, 675, 678.

[17] See License Agreements, R. pp. 675, 678, 679.

(E) Respondent Petersen Saves Inventor From Defaulting Licensees

A few years after Jones' Patent issued, and after the Jones invention had been marketed by the licensees referred to above, the Petersen Manufacturing Company of DeWitt, Nebraska (one of the Respondents herein) became interested in marketing a wrench with a quick release lever thereon. Petersen requested its attorneys to make a search of the patent records to ascertain if the release lever construction which it proposed to manufacture, would be an infringement of any patent. The search developed the Jones patent, now in suit, and Petersen thus sought a license thereunder.[18]

At the time Petersen sought the license, Jones' prior licensees were in arrears in their payments to Jones. For this reason, among others, Jones was legitimately most dissatisfied with them.[19] When Petersen offered Jones a license arrangement, Jones cancelled the prior licenses due to the licensees' violations, and entered into an exclusive license arrangement with Petersen.[20]

(F) Petitioner Sears Buys Respondents' Wrench for Purpose of Making and Selling a Competitive Structure—Petitioner Parker Makes Model of Jones Wrench With Parts Merely Reversed From Model Sold By Respondent Petersen. Court Finds Petitioners' Model Within Patent Claims Expressly and Implicitly

After Petersen had marketed its quick release plier-type toggle wrench, as constructed in accordance with the preferred embodiment of the Jones patent, under the license from Jones, the hardware buyer for Petitioner Sears, Roebuck, knowing of Sears' prior failure and abandonment of

[18] R. pp. 136, 137, 154.

[19] R. pp. 154, 828-841.

[20] See License Agreement, R. p. 389.

a different type of so-called quick release wrench,[21] purchased a Petersen wrench with the Jones' quick release thereon, and after noticing the successful operation thereof,[22] suggested that Petitioner Parker observe the same. Petitioner Sears requested that Petitioner Parker manufacture for Sears a quick release wrench competitive with Respondents' quick release wrench.[23] Parker devised several alternatives of quick releases, most of which were far removed from the Respondent Jones Patent.[24] However, one of the devised types of quick releases was applied to Petitioners' wrench here in suit, and it was this device—the closest of the Parker alternatives to the Jones construction and the Petersen product—which Parker manufactured and Sears, Roebuck sold.[25] It was this device that differed from the Petersen model by only reversing the quick release parts thereof, a feature now admittedly literally covered by one of the claims;[26] it was this device that in fact was found by the Court to also infringe other claims of the Jones patent by applying even the most minimal range of equivalents.

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[21] See R. p. 415 where Maerlander admits designation of prior structure as a "quick release" is a misnomer.

[22] R. p. 444 (Maerlander).

[23] R. p. 445 (Maerlander). Petitioners assert Parker made an independent development, but even the chief Parker engineer admits he knew of the Petersen wrench with quick release and the Seymour Smith wrench before Parker's production, R. p. 229.

[24] See opinions given Parker by counsel, R. pp. 25, 26.

[25] Structure in suit is referred to in opinions (Footnote 24) as one with release lever pivoted on toggle link.

[26] The admission is implied in Petitioners' Petition herein, and is expressly acknowledged at p. 20 of Petitioners' Brief filed in the Court of Appeals.

(G) Petitioners' Attorney Gives Erroneous Opinion as to Infringement—Claim of Patent Admittedly Reads Literally on Accused Structure Within Most Limited Express Meaning of Words Thereof

Parker consulted its Patent Attorney with respect to the wrench in suit, and was advised of the Jones patent.[27] The attorney rendered an opinion as to the patent and the various devices proposed by Parker on the same day that he received the Parker models and at a time when an opinion of non-infringement was essential to Parker's receiving a large Sears contract for the manufacture of a quick release wrench.[28] The opinion contained an obvious and now admitted error in claim interpretation and, apparently, it is this error which resulted in the instant proceeding.[29] In brief, the opinion ignored Claim 5 of the patent, when in fact claim 5 admittedly reads on and expressly covers the accused structure.

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[27] R. pp. 25, 29, 32 (Letters).

[28] See R. p. 25, first paragraph of letter; also see explanation, R. pp. 37-39.

[29] Opinion states Claim 5 does not read on Parker wrench, but Petitioners now admit Claim 5 does read on Parker wrench. See fn. 26.